IN THE

# Supreme Court of The United States

**OCTOBER TERM, 1976**

**No. 76-461**

JOHN CONNALLY,
*Appellant,*

v.

STATE OF GEORGIA,
*Appellee.*

## MOTION TO AFFIRM

Please serve:

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The State of Georgia, by and through the Attorney General of the State of Georgia, moves this Court to affirm the decision of the Supreme Court of Georgia in the case of Connally v. State, (No. 30815) (1976), insofar as that decision upholds the facial constitutionality of the Georgia law providing for the compensation of justices of the peace on the ground that this particular question is within the rule of certain cases which have been decided by this Court, and therefore, is

so unsubstantial as to warrant no further argument and that the decision of the Supreme Court of the State of Georgia in this regard was correct.

## STATEMENT OF THE CASE

The basic concern of the Attorney General of the State of Georgia in the present case involves the challenge to the facial constitutionality of the Georgia law concerning the compensation of justices of the peace. This office did not participate in the trial or conviction of the Appellant, but did file a brief in the Supreme Court of Georgia concerning the constitutionality of the law which is challenged in this appeal. Therefore, this office is unprepared to accept or modify the Appellant's statement of the case. However, to the extent that the Appellant's statement of the case establishes that a search warrant was issued by a justice of the peace who received five dollars compensation therefor, that statement is adopted herein.



## ARGUMENT

### THE GEORGIA LAW PROVIDING FOR THE PAYMENT OF FIVE DOLLARS TO A JUSTICE OF THE PEACE FOR ISSUING A SEARCH WARRANT IS NOT VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The present case sets forth two issues, one of which involves a challenge to the facial constitutionality of Ga. Code § 24-1601 which pertains to the compensation of justices of the peace. It is solely with this issue that this motion to affirm will be concerned. The Appellant challenges Ga. Code § 24-1601 on the ground that a justice of the peace who receives five dollars for issuing a search warrant, but receives nothing for refusing to issue a search warrant, offends the Fourth and Fourteenth Amendments of the United States Constitution. According to Appellant, the law violates these constitutional provisions because it deprives a defendant of the right to a neutral and detached magistrate at the time that a search warrant is issued.

In the Georgia Supreme Court, Appellant relied heavily upon Shadwick v. City of Tampa, 407 U.S. 345 (1972) and Tumey v. Ohio, 273 U.S. 510 (1927). That Court held that Appellant's contention could not be sustained on that authority.

In Shadwick v. City of Tampa, supra, at 350 it was stated:

> "* * * This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, supra, at 14; Giordenello v. United States, supra, at 486."

What the quoted language clearly indicates is that a magistrate is neutral and detached so long as he is independent of the police or, at least, not involved in the enterprise of ferreting out crime. Indeed, after a review of the existing authority, it does not appear that this Court has ever rendered a decision finding a magistrate lacking in neutrality under the Fourth Amendment in any other circumstances.

The Appellant's reliance upon Tumey v. Ohio, supra, in the court below, indicates that his contention was that the issuance of warrants should be governed by the standard of fundamental fairness. That argument was rejected by the Supreme Court of Georgia. The decisions of this Court indicate that even under a standard of fundamental fairness, Ga. Code § 24-1601 is not offensive to the United States Constitution. Tumey v. Ohio, supra, held that a defendant was deprived of the right to a neutral and detached magistrate where the magistrate who presided at his traffic hearing had a direct and substantial pecuniary interest in convicting him. Later, Bevan v. Krieger,



289 U.S. 459, 465 (1933) distinguished the Tumey decision as follows:

> "The Appellant Bevan also advances the contention that the notary had such a pecuniary interest in compelling the testimony as would disqualify him, and deprive his ruling of the impartiality required for due process. Notaries are entitled to fees of twenty-five cents per hundred words for taking and certifying depositions (General Code, §§ 127, 1746-2). These are paid in the first instance by the party taking the depositions, and are taxable as costs in the suit. It appears from the record that it is also customary for the notary if, as in this case, he happens to be a stenographer, to take the testimony stenographically and to furnish additional copies to the parties at a charge somewhat less per hundred words than is provided in the statute. These facts are said to bring the case within the principle announced in Tumey v. Ohio, 273 U.S. 510. But we think the suggested analogy does not exist. Tumey, as mayor of a city, sat as a magistrate. His judgments were final as to certain offenses, unless wholly unsupported by evidence. The law awarded him a substantial fee if he found an offender guilty, and none in case of acquittal. Tumey's interest was direct and obvious; but the possibility that the extent of the notary's services and the amount of his compensation may be affected by his ruling is too remote and

incidental to vitiate his official action. Moreover, his action lacks the finality which attached to the judgment in the Tumey case as it is subject to review. . . ."

The Tumey and Bevan decisions seem clearly to stand for the principle that fundamental fairness is not offended by a system which allows a public official to conduct a proceeding, involving the exercise of judgment, unless such public official has a pecuniary interest in the proceeding, which is substantial, direct and obvious and his judgment is final. Ga. Code § 24-1601 is not offensive to this rule. The five dollar fee which the justice of the peace receives for issuing a search warrant is not substantial. In addition, the fee is not collected directly from the defendant (as in Tumey), but from the county funds. Also, the issuance of a search warrant is not a final judgment, but is reviewable in the normal course of a criminal case through a motion to suppress. The instant case is clearly within the rule of Bevan v. Krieger, supra.

## CONCLUSION

While the Georgia law challenged in the present case has not been expressly approved by this Court, the decisions of this Court indicate that the law is not offensive to either the Fourth or Fourteenth Amendment of the United States Constitution. Indeed, it does not appear on the face of the statute that a justice of the peace is not neutral and detached.



Further, it does not appear from the face of the statute that a defendant is denied fundamental fairness when a search warrant is issued to search his premises.

For the above reasons, it is respectfully submitted that the Georgia law challenged in this case is constitutional under the United States Constitution, and the decision of the Supreme Court of Georgia so ruling should be affirmed.

Respectfully submitted,

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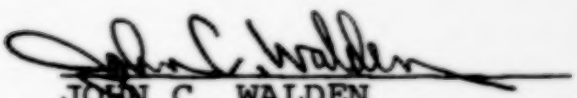
## PROOF OF SERVICE

I, John C. Walden, Attorney for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served three copies of the foregoing Motion to Affirm upon the Appellant by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record as follows:

David P. Daniel
Attorney for Appellant
104 Howard Street
Rossville, Georgia 30741

This 29th day of October, 1976



JOHN C. WALDEN